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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 114

STEWART B. HOPPS, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18; III R 13-32)[1] is reported at 331 F. 2d 332. The opinion of the district court denying the motion to suppress (I R 144-180) is reported at 215 F. Supp. 734.

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[1] "R" designates the three-volume record on file with the Clerk of this Court.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1964 (III R 34). A petition for rehearing *en banc* was denied on April 23, 1964 (III R 56; Pet. App. 19). The petition for a writ of certiorari was filed on May 22, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether documents introduced against petitioner at his trial were lawfully obtained.

2. Whether the trial judge correctly instructed the jury as to the consideration it might give to evidence of other misrepresentations by petitioner.

STATEMENT

After a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on both counts of a two-count indictment charging mail fraud in violation of 18 U.S.C. 1341 (I R 2-9, 398; III R 4). He was sentenced to eighteen months' imprisonment on each count, to run concurrently, and fined $1,000 on Count One (III R 4). The court of appeals affirmed (Pet. App. 1-18; III R 13-32).

1. The evidence, which is not in issue, is set out in the opinion of the court of appeals (Pet. App. 1-7) and may be summarized as follows:

Sometime in 1957, petitioner, who had broad experience in the insurance and reinsurance fields, arranged for the sale of a foreign insurance company chartered in Tangier, Morocco, to a number of American investors. In late 1957, the name of this corpo-

ration was changed to International Guaranty and Insurance Company (hereinafter "International"). Petitioner did not acquire stock in nor was he an officer of International. His formal relationship was that of adviser or consultant, but he actually ran the company's business.

In November 1957, petitioner caused the preparation of a statement concerning the financial condition of International as of September 1957, which was filed with the Insurance Commissioner of Nevada. This statement included among the assets of International the purported stocks and bonds of four named but nonexistent companies. Thereafter, at petitioner's direction, the named companies were incorporated in Panama. Those named as directors—two associates and one employee of petitioner—never held meetings and never issued stocks or bonds. The companies did no business either in Panama or in the United States.

In early 1958, in response to general apprehension in the insurance industry concerning the insurance of domestic savings and loan associations by foreign companies, a brochure concerning International was prepared under petitioner's direction and mailed throughout the United States. Among other things, this brochure contained a purported balance sheet of International as of December 31, 1957. While the names of the companies purportedly issuing the stocks and bonds included in the assets of International were not listed, the court of appeals held that there was evidence on which the jury could find that the majority of the stocks and bonds listed on the December balance sheet were the same as those listed in the September balance sheet; that such securities were, in fact, worthless; and that petitioner, with fraudulent intent and in further-

ance of the scheme to defraud, caused the brochures containing the statement of worthless assets to be mailed.[2]

2. Prior to trial, petitioner filed a motion for the suppression and return of various documents, papers and correspondence, alleging that they were the fruits of illegal searches and seizures at offices in San Francisco, California, New York, New York, and Silver Spring, Maryland (I R 20-32, 180-183). A hearing was held by the district court on this motion, and the following facts were adduced:

a. *The California Papers.*—During 1957 and up until April 1958, petitioner conducted insurance operations at an office located at Suite 1001, 417 Montgomery Street, San Francisco. International carried on business from this location and kept its books and records there (II R 2, 36-37, 39, 41, 49, 59-60, 62, 94, 97-102, 110-111). As a result of an investigation by the California Insurance Department initiated in early 1958, it was determined that International was operating, out of Suite 1001, as an unauthorized insurance carrier in violation of California law, and that there was consequently adequate justification to petition the Superior Court of California for an order of conservatorship (Cal. Ins. Code, § 1011) (II R 1-3, 46-51, 61-62). Based on this information, a petition was filed in the Superior Court of California (I R 399-408);[3] it was

[2] The indictment charged a mailing of the brochure in early 1958 to Charles B. Jackson, Insurance Commissioner, Baltimore, Maryland, and a similar mailing in 1958 to the Better Business Bureau of Baltimore (I R 2-9).

[3] In late March 1958, before the petition was filed, a conference was held with the General Counsel of International (J. W. Ehrlich) with the result that judicial action was postponed to permit counsel to confer with his clients and to pay current expenses of Interna-

granted on the same date (II R 3). The *ex parte* order of the California court vested the Insurance Commissioner of California, as conservator, with right, title and interest in all of the assets of International and further decreed "that said Commissioner be and he hereby is directed forthwith to take possession of all the books, records, property, real and personal, and assets of respondent insurer * * *" (I R 410, 409-412).

Although not formally served, petitioner was apprised of the conservatorship order soon after its issuance (II R 12-13, 22-24, 103-104). Shortly thereafter, a California law firm was hired to represent International in the conservatorship proceeding (I R 209-210; II R 12). In connection with the conservatorship order, Eugene S. Clifford, a member of the firm, testified at deposition proceedings conducted by the State Insurance Department that State investigators were "more than welcome to see" anything in the office on Montgomery Street that related to International, but not petitioner's personal papers (I R 211; II R 14). The next day, April 10, 1958, an agreement was worked out between counsel for International and the State officials providing that the Insurance Commissioner would have complete access to International's records wherever located. A press release was issued to that effect (I R 204, 205-206; II R 40, 54-55).

Pursuant to this agreement two employees of the Insurance Department met with Mr. Clifford at Suite

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tional in the amount of $10,000. When subsequent investigation revealed that more than this amount (some $40,000 or $50,000) had been withdrawn from International's account to pay personal expenses it was decided to apply for an order of conservatorship to preserve the remainder of International's assets (II R 51-54).

1001 on April 14-15, 1958. One of the investigators testified that he and his co-worker found filing cabinets in the large outer office of the suite; that nothing was taken from several file drawers marked with names other than "International Guaranty and Insurance Company"; that a number of drawers were unmarked and contained loose documents; that these documents were examined and if the investigator noticed some name in the file which he had run across in the investigation of International, the documents would be handed over to Mr. Clifford for further inspection; and that Mr. Clifford refused to permit the removal of a number of these documents and the investigators acquiesced in his decision (II R 64-69, 71, 78). The investigator further stated that one drawer in the filing cabinet was marked "International Guaranty and Insurance Company", and, after Mr. Clifford had made a brief examination of its contents, he told the investigators to remove the entire file (II R 66-67, 72, 77). After review and approval by Mr. Clifford, certain miscellaneous papers of International were also removed from two of the four desks located in the outer office (I R 285-286; II R 72-74, 79). The investigators did not enter or take any records from petitioner's private office. Their only purpose, according to the investigator, was to secure the records of International (I R 290; II R 65-67).[4] Some time later, additional files and papers belonging to International were turned over by counsel, including records which petitioner had removed from Suite 1001 prior to April 14 (I R 277-279; 128-130; II R 75-77,

[4] Mr. Clifford testified at the hearing that while he did not specifically object, he did not agree to any of the records being taken by the State investigators, but felt bound by the conservatorship order. According to his version, he simply agreed to be on the premises when the taking occurred to see what went on (I R 214, 218-221).

99-100; 103-113). During the time that these documents were in possession of the State authorities, they were examined by postal authorities and by employees of the Attorney General's office of New York (I R 288, 305-307).

Almost two years later (March 30, 1960), the California court ordered the Insurance Commissioner[5] to return the papers of International (I R 162). On the following day, while the records were still in the possession of the Insurance Commissioner, subpoenas *duces tecum* were issued by the United States District Court for the District of Maryland, at the instance of the United States Attorney for the District of Maryland, to the Insurance Commissioner and to Mr. Clifford calling upon them to produce the records of International (I R 207-209). Mr. Clifford moved to quash these subpoenas in the United States District Court for the Northern District of California on the ground that they were too broad. That court ordered that the subpoenas be made more specific and, when this was done, upheld them as valid (II R 8, 10-12). Before the documents were forwarded to the United States Attorney in Baltimore, the Insurance Commissioner asked the California court to modify its order of March 30, 1960, and to permit the records to be surrendered in accordance with the subpoena. Following a hearing, a formal order to that effect was entered by the California court.[6]

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[5] In the fall of 1958, an order had been entered by the State court terminating the business of International in California and appointing the Insurance Commissioner as its liquidator (I R 162).

[6] The district court found that the subpoena was complied with by the Insurance Commissioner after the hearing but before the entry of the formal order of the California court because the court had indicated at the hearing that its formal order would authorize compliance with the subpoena (II R 138-140).

b. *The New York Documents.*—There was evidence that a substantial amount of International's business was conducted from an office which petitioner maintained at 44 Wall Street in New York (I R 305). In 1959 the office was run by Miss Loretta C. Lindhauer, petitioner's former secretary, who had custody of the books and records of International and was on the payroll of one of the corporations in which petitioner had an interest (I R 259-261; II R 15, 24-25, 39, 102, 109-111, 114-116). During that same year the Attorney General of New York initiated an inquiry into the practices of savings and loan associations within the State (I R 296-297; II R 81-82). In the course of this investigation, Miss Lindhauer was served with a subpoena issued by the Attorney General of New York pursuant to State law to produce "[y]our correspondence files * * * pertaining to International Guaranty and Insurance Co." (I R 298-300; II R 84-87). Acting on the advice of counsel, Miss Lindhauer agreed to turn over such records of International as she had in her custody.[7] Pursuant to this agreement, a representative of the Attorney General obtained the documents she had prepared at 44 Wall Street. Later that same day Miss Lindhauer identified these records (I R 300-302; II R 83-84). No unconsented search or seizure of records took place at the 44 Wall Street office (II R 80), and no one ever contested the validity of the subpoena or requested that the documents be returned (I R 305; II R 80). In 1962, the records were turned over to the United States District Court for the District of Maryland pursuant to a subpoena

[7] Miss Lindhauer had discussed the subpoena with petitioner and, at his suggestion, consulted his New York attorneys. They told her to consult her own attorney (II R 15-18, 24-25).

duces tecum for use in the instant case (I R 304-305; II R 81).[8] No challenge was ever made to the subpoena.

c. *The Silver Spring Records.*—In early 1958, petitioner directed the incorporation in Maryland of International Guaranty and Insurance Underwriters to act as an agent of International. An office of the corporation was subsequently opened in Silver Spring, Maryland, under the supervision of petitioner and his staff (I R 153-155). In April 1958, a subpoena *duces tecum* was directed to International Guaranty and Insurance Underwriters to produce its records before the grand jury for the District of Maryland which was then conducting an investigation into savings and loan associations. By this time, "Chicago interests" had assumed control of the corporation and employed an attorney to represent the company. He produced the records demanded by the subpoena. Neither petitioner nor representatives of the corporation ever challenged the subpoena (II R 132-135, 140).

The district court found that the taking of International's papers by the California officials was authorized by the conservatorship order, and that these papers were subsequently obtained lawfully from the State by the federal government; that petitioner had no standing to complain of any violation of corporate rights regarding the taking in California of papers belonging to corporations other than International which he controlled or in which he held an interest; and that he was entitled to the return of any purely

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[8] These records were also subpoenaed in 1960 by the district court for use in a trial involving the Commercial Savings & Loan Association. They were subsequently returned to the State authorities (II R 81).

personal papers (I R 163-171). As to the New York papers, the court found that Miss Lindhauer was their custodian; that the subpoena was not too broad in scope; that petitioner had no standing to complain of the New York taking of International's papers since at the time of the subpoena he did not control or own International; that he had no standing as to the papers of other corporations; and that he was entitled to the return of purely personal papers (I R 175-178). As to the taking of the documents of International Guaranty & Insurance Underwriters of Silver Spring, Maryland, the court ruled that petitioner had no standing to object and that, in any event, all rights had been waived since no one had ever objected to the subpoena (II R 140-141).

Subsequent to his written opinion the trial judge advised counsel that from his incomplete examination of the documents there did not seem to be "many personal papers of Hopps" and what there were did not appear "to be material to any possible issue in the case, including the possibility that they might have led to discovery of other evidence which might have been presented to the grand jury or otherwise used by the government" (II R 131). The court further stated that it would be willing to rule on the admissibility of all personal papers that counsel for the defendants brought to its attention, and that it would decide whether there should be a hearing to determine whether any suppressed papers provided improper investigative leads for the prosecution upon a claim that particular documents "carried 'poison'" (II R 131-132, 136-137, 141-142). Petitioner made no showing that any papers suppressed as personal property provided investigative leads.

The court of appeals affirmed. It held that the taking of the various papers was lawful and that the documents were therefore admissible against petitioner (Pet. App. 13-18).

ARGUMENT

1. The court of appeals correctly ruled that the corporate papers were obtained by lawful process and that their introduction into evidence did not violate petitioner's Fourth Amendment rights.

a. Until the motion to suppress, petitioner never appeared personally to challenge the California conservatorship proceeding, the taking of papers pursuant to the order of the California court, or the subpoenas *duces tecum* issued by federal authorities. His belated contentions are without substance.

The California order of conservatorship did not, as would a search warrant, identify the place to be searched or the things to be seized because that order neither purported to be nor was designed to be a search warrant. Rather, it was a stage in a well established State proceeding to assume control over the operations of illegally operated local insurance companies. The constitutionality of the California proceeding has been sustained by this Court. *Neblett* v. *Carpenter*, 305 U.S. 297.[9] Moreover, the commands of the order were implemented pursuant to an agreement with International, and one of International's attorneys was present at the San Francisco office to

[9] By the same token, the fact that the order, in part, might have been based on information and belief does not detract from its validity. In any event, even if it is properly to be analogized to a search warrant, such a warrant may be based on reliable hearsay. *Jones* v. *United States*, 362 U.S. 257, 269-272.

supervise the taking and to protect against rummaging through petitioner's personal files (*supra*, pp. 5-6). The records of International were, in short, lawfully obtained by the State authorities. In these circumstances, irrespective of whether petitioner has standing to assert a Fourth Amendment claim as to papers of a corporation, particularly one in which he owns no stock (see, *e.g.*, *Wilson* v. *United States*, 221 U.S. 361; *United States* v. *White*, 322 U.S. 694), the government's examination of International's papers and their ultimate possession of such documents was wholly lawful. See *Matter of Harris*, 221 U.S. 274; *Johnson* v. *United States*, 228 U.S. 457; *Ex Parte Fuller*, 262 U.S. 91.

b. Nor is the legality of the federal government's possession and use of these papers tainted by the fact that they were turned over to federal authorities before specific authorization by the State conservatorship court. This is not a case like *Dier* v. *Banton*, 262 U.S. 147, relied upon by petitioner (Pet. 24-26), where this Court observed that books in the custody of a bankruptcy court "can not be taken therefrom by subpoena of a state court except upon consent of the federal court." 262 U.S. at 151. Here, by State court decree, the Insurance Commissioner, not the court, was in lawful possession of the books and records of International, and he was empowered to comply with lawful process. See *United States* v. *Culver*, 224 F. Supp. 419, 435-436 (D.Md.); but cf. *United States* v. *Kanan*, 225 F. Supp. 711, 715 (D.Ariz.). In any event, the Insurance Commissioner did seek judicial approval before complying with the subpoena, and it is undisputed that—as found by the district court (II R 140)—the California court had revealed its ultimate decision to

the parties at a hearing on the Insurance Commissioner's motion, which was before the records were turned over. See note 6, *supra*.

c. There is no merit to petitioner's claim that the district court's decision that he had no standing to challenge the seizure of papers of other related corporations causes this case to conflict with the decision in *Jones* v. *United States*, 362 U.S. 257, and with *Henzel* v. *United States*, 296 F. 2d 650 (C.A. 5). Aside from the fact that *Henzel* is plainly distinguishable on its facts,[10] the district court's ruling regarding standing was nothing more than an alternative holding. The government's evidence demonstrated that the State investigators removed only those documents which were related to International, and only after Clifford approved their removal. Indeed, Clifford urged that the entire drawer marked "International Guaranty and Insurance Company" be removed so that the documents could be kept intact (II R 77).

d. Petitioner contends (Pet. 27) that Miss Lindhauer never was in legal possession of the New York records and was not, therefore, authorized to surrender them. But both courts below found that Miss Lindhauer was, in fact, the custodian of the corporate records and was authorized to comply with

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[10] In *Henzel*, the person who sought supression of corporate records was the president and sole stockholder of the corporation, and the records had been illegally seized from his office for purposes of criminal prosecution. It was undisputed that the search was "directed at" him (296 F.2d at 653). *Henzel* has been limited to its own facts by the Fifth Circuit in *Peel* v. *United States*, 316 F.2d 907, 909-910, certiorari denied *sub nom Zane* v. *United States*, 375 U.S. 896.

the subpoena (I R 176-177; Pet. App. 16).[11] There is no reason for this Court to review that factual determination.

e. Petitioner also urges (Pet. 27) that the New York subpoena was unreasonably broad. Assuming, *arguendo*, that this claim could now be made notwithstanding compliance by the custodian, the subpoena was valid. The New York authorities were investigating advertising that International was the insurer of savings and loan association deposits. The records of International were manifestly pertinent to that investigation. A subpoena is proper "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652; see *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208-209; *McPhaul* v. *United States*, 364 U.S. 372, 382-383.[12]

f. Nor is there merit to petitioner's claim that the documents produced by Miss Lindhauer were "im-

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[11] The district court described Miss Lindhauer's status as follows: "She was * * * the manager of the office at 44 Wall Street, who sent and received many letters and cables in her own name, was then on the payroll of Anglo-can, and was the only occupant of the office at 44 Wall Street except when Hopps or some of the Hopps corps visited it from time to time in connection with the business of the several corporations. She was undoubtedly the custodian of all the records, having a measure of control, more than bare possession, though less than ownership, with respect to all of them" (I R 176-177).

[12] For similar reasons, petitioner's challenge (Pet. 29) to the breadth of the subpoena *duces tecum* directed to International Guaranty and Insurance Underwriters of Silver Spring, Maryland must fall, for its records—which were relatively insubstantial in quantity—were likewise relevant to the grand jury investigation of savings and loan institutions.

pressed with an immunity" (Pet. 28) by virtue of Article 23-A, § 359 of the New York General Business Law. Petitioner, who neither testified nor produced documents in the State investigation, was a stranger to the proceeding in which immunity is authorized.

g. Petitioner argues (Pet. 30-31) that the district court erred in failing to segregate the items suppressed from those not suppressed or to hold a hearing to determine whether suppressed items were illegally used as investigative tools. This argument overlooks the fact that petitioner was given full opportunity by the district court to obtain rulings as to the admissibility of any individual papers (some of which were suppressed, see, *e.g.*, I R 188-191; II R 143-144) and that the court stated that it would decide whether "any further hearings should be held after counsel have pointed out to the Court which of the personal papers are material in the sense that counsel contend they carried 'poison' " (II R 137; see also II R 131-132, 136, 141-142). Petitioner can hardly be heard to complain that the court conducted no formal hearing on this issue when he failed to comply with the court's request that he specifically identify the papers which allegedly contaminated other evidence.

2. There was evidence that, as charged in the indictment (I R 6-7), the reinsurance facilities of International were also misrepresented. In its instructions to the jury, the district court limited the charge against petitioner to the representations in the 1958 brochure regarding the assets of International consisting of the stock of the four Panamanian companies. As to the

representation with regard to reinsurance facilities, the court charged (I R 395-396)—

> Now, I instruct you that you may consider the evidence offered on that point, on the question of wilfullness on the part of Stewart B. Hopps; that is, whether Stewart B. Hopps wilfully caused the letters and brochures to be mailed as part of the alleged scheme to defraud and to obtain money by means of false and fraudulent pretenses and misrepresentation; and that he knew, at the time the brochures were mailed, that the brochure was false and fraudulent in the two particulars I have referred to (namely, the bonds of Republic Finance or Finance Republique; and the stock of the other three Panamanian corporations).
>
> As I have said, if you find that the statements in the brochure with respect to reinsurance were false, that would not prove the Defendant guilty of the offenses charged, which are being submitted to you for your consideration. He can only be found guilty of the offenses charged if you find him guilty, beyond a reasonable doubt, of the essential elements of those charges as they are stated to you in these instructions.

Petitioner contends that to allow the jury to consider the reinsurance evidence with respect to willfulness permitted the jury to find specific knowledge of the worthlessness of the assets from proof of misrepresented reinsurance—an allegedly unrelated fact (Pet. 32-33). The jury could not, however, draw any such inference in view of the specific statement in the judge's charge that false statements as to reinsurance "would not prove the defendant guilty of the offenses charged". Rather, the jury could use the evidence of misrepresented reinsurance only for the pur-

pose permitted by the court—to determine whether petitioner committed his acts with the necessary fraudulent intent.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1964

☆U. S. GOVERNMENT PRINTING OFFICE 1964—738908/P.O. 68